

Bruce K. Medeiros
DAVIDSON BACKMAN MEDEIROS PLLC
1550 Bank of America Financial Center
601 West Riverside Avenue
Spokane, Washington 99201
(509) 624-4600
Email: bmedeiros@dbm-law.net

Michael R. Johnson (*Pro Hac Vice Pending*)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
Email: mjohnson@rqn.com

Attorneys for Rabo AgriFinance, Inc.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:

**COLUMBIA MANUFACTURING, INC.,
dba COLUMBIA ONION,**

Debtor.

Case No. **16-00898**
Case No. **16-00899**
Case No. **16-00900**
Chapter **11**

In re:

WAHLUKE PRODUCE, INC.,

Debtor.

**RABO AGRIFINANCE, INC.'S
INITIAL RESPONSE AND
OBJECTION TO THE DEBTORS'
MOTION FOR INTERIM AND FINAL
USE OF CASH COLLATERAL**

In re:

TATOES, LLC,

Debtor.

Rabo AgriFinance, Inc. ("RAF"), which is the primary secured lender to the Debtors' in the above-entitled Chapter 11 cases, through counsel, hereby files this Initial Response and Objection to the Debtors' *Motion for an Order: (A) Authorizing Emergency & Interim Use of Cash Collateral; (B) Authorizing Final Use*

Page 1
Rabo's Initial Response to the Debtors' Motion for
Interim and Final Use of Cash Collateral
Rabo\Pleadings.sa

DAVIDSON BACKMAN MEDEIROS
ATTORNEYS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY
1550 BANK OF AMERICA FINANCIAL CENTER
601 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201
FACSIMILE: (509) 623-1660
(509) 624-4600

1 of Cash Collateral (the "Cash Collateral Motion") (Docket #6), filed March 21, 2016.

2 In support of this Initial Response to the Cash Collateral Motion, RAF states as
3 follows:

4 1. In the Cash Collateral Motion, the Debtor raises a number of issues
5 and requests far-ranging relief that the Court should not consider at the
6 preliminary hearing on the Cash Collateral Motion. Instead, the Court should
7 limit its inquiry to the cash collateral use that is absolutely necessary pending a
8 final hearing on the Cash Collateral Motion, after giving RAF and other parties in
9 interest a reasonable period of time to investigate the Debtors' budgets and
10 general financial affairs, and file a more detailed response to the Cash Collateral
11 Motion.
12
13

14 2. In this regard, RAF obviously recognizes that the Debtors have a
15 relatively urgent need to use certain amounts of cash collateral to pay for such
16 things as employees, utilities and inputs and other expenses associated with the
17 2016 Crop. On the other hand, if RAF understands the Cash Collateral Motion,
18 the Debtors are asking this Court to approve at the interim hearing, and on
19 essentially one day of notice, the continued use of cash collateral through Friday,
20 May 27, 2016, or for ten more weeks, as outlined in the "Emergency Budgets"
21 attached as Exhibits 2, 3 and 4 to the Declaration of Del Christensen in Support
22 of Motion for Use of Cash Collateral and First Day Motions ("Christensen
23 Decl.") (Docket #7).
24
25

1 3. That request is unreasonable and unauthorized, and it should not be
2 approved. Federal Rule of Bankruptcy Procedure 4001(b)(2) provides that, at a
3 preliminary hearing requesting the use of cash collateral, “the court may
4 authorize the use of only that amount of cash collateral as is necessary to avoid
5 the immediate and irreparable harm to the estate pending a final hearing.”
6 (Emphasis supplied). RAF assumes that the Court will be able to schedule a final
7 hearing on the Cash Collateral Motion within the next thirty days. Further, RAF
8 notes that the nature of farming is inherently risky, and that RAF’s personal
9 property cash collateral is highly volatile (cash, accounts receivable and
10 inventory). As a result, RAF’s collateral position in these cases is going to change
11 on a daily basis, and perhaps for the worse. If things go poorly for these Debtors
12 then RAF’s collateral position could be materially and prejudicially eroded. It
13 would not be appropriate to allow the Debtors interim cash collateral authority
14 through the end of May given these facts.
15
16
17

18 4. In short, the Debtors are requesting that this Court, at the
19 preliminary hearing, authorize a lengthy use of cash collateral that would dictate
20 not only the outcome of the final hearing on cash collateral but perhaps the
21 ultimate outcome of these cases. The Court should refuse to do that. Instead, it
22 should limit the Debtor’s use of cash collateral to the line-item expenses outlined
23 in the weekly budgets attached as Exhibits 2, 3 and 4 to the Christensen Decl. for
24 the periods ending March 25, 2016 (post-petition period only), April 1, 2016, April
25

1 8, 2016, April 15, 2016 and April 22, 2016 only.¹ Further, the Court should
2 schedule a final hearing on the Cash Collateral Motion on or shortly before April
3 22, 2016, and it should further hold that the Debtors' authority to use cash
4 collateral on an interim basis shall cease on the earlier to occur of (a) April 22,
5 2016, at 11:59 a.m., or (b) the conclusion of the final hearing on the Cash
6 Collateral Motion.
7

8 5. Second, because only expenses that are "necessary to avoid
9 immediate and irreparable harm" may be authorized at an interim hearing on
10 cash collateral, RAF believes that, while the Court should generally authorize the
11 use of cash collateral through April 22, 2016 or the conclusion of the final
12 hearing (whichever occurs first), the Court should not authorize the Debtors to
13 use or expend funds pending the final hearing on the following items:
14

15 a. Tatoes Emergency Budget (Exhibit 2).
16

17 i. Professional Fees-Tatoes has budgeted \$443.59 each week for
18 professional fees. There is no explanation or detail regarding this expense. There
19 have been no orders entered authorizing the payment of retainers for
20 professionals, no orders entered authorizing the employment of professionals and
21

22 ¹ Because RAF does not know the specific expenses making up the line items in
23 the proposed "Emergency Budgets" (e.g., RAF does not know which employees
24 and principals, if any, will be paid under the "wages" line item), RAF does not
25 concede that all of the budgeted amounts through April 22, 2016 are indeed
amounts which must be expended to avoid immediate and irreparable harm. RAF
reserves the right to challenge any and all proposed expenses at the final hearing
on the Cash Collateral Motion.

1 there have been no professional fees allowed. Payments from this line item
2 should not be authorized pending the final hearing on the Cash Collateral Motion.

3 ii. Rent Property-Tatoes has budgeted \$967,235.00 for “rent
4 property” during the week ending April 1, 2016. RAF assumes that these
5 expenses would be for land rental for the 2016 crops. However, that is unclear
6 from a review of the budget. While some of these expenses may be appropriate
7 uses of cash collateral, it is a large amount, and deserves further investigation.
8 Payments from this line item should not be authorized pending the final hearing
9 on the Cash Collateral Motion unless, prior to that time, the Debtors can provide
10 further detail of these expenses including showing that the expenses are due, at
11 which time RAF could then authorize the expenditures in advance of the final
12 hearing. Indeed, RAF’s preliminary investigation has raised the following
13 questions regarding these expenses:
14
15

16 1. The expenses appear to include \$34,000.00 in payments
17 on or before April 1 to “Leland” under a pre-petition lease under which the
18 payment was due on March 15, 2016 [see Docket #7, pg. 36], or prior to the
19 Petition Date. The Debtors should not be paying pre-petition lease obligations
20 unless and until the Debtors, after appropriate notice and hearing, are authorized
21 to assume the subject lease;
22
23

24 2. The expenses appear to include \$8,325.00 in payments
25 on or before April 1 to “Stayner” under a pre-petition lease under which the

1 payment was due on March 15, 2016 [Docket #7, pg. 36], or prior to the Petition
2 Date. The Debtors should not be paying pre-petition lease obligations unless and
3 until the Debtors, after appropriate notice and hearing, are authorized to assume
4 the subject lease;

5
6 3. The expenses appear to include \$42,000.00 in payments
7 on or before April 1 to "Neil C." [Docket #7, pg. 36] Neil C is believed to be Neil
8 Christensen, who is believed to be related to Del Christensen. No payments
9 should be authorized to "Neil C" until his relationship with the Debtors and the
10 basis for such payments are further investigated;

11
12 4. The expenses appear to include \$21,000.00 in payments
13 on or before April 1 to "Ryan C." [Docket #7, pg. 36] Ryan C is believed to be
14 Ryan Christensen, who is believed to be related to Del Christensen. No payments
15 should be authorized to "Ryan C" until his relationship with the Debtors and the
16 basis for the payments are further investigated;

17
18 5. The expenses appear to include \$40,000.00 in payments
19 on or before April 1 to "DAC." [Docket #7, pg. 37] DAC is believed to be DAC
20 Properties, LLC, an affiliate of the Debtors, and also a collateral grantor of some of
21 the collateral securing the Debtors' loans from RAF. No payments should be
22 authorized to DAC as part of interim use of cash collateral and, instead, the Court
23 should consider whether payments to DAC are warranted as part of the final
24 hearing;
25

1 6. The expenses appear to include \$16,000.00 in payments
2 on or before April 1 to “Bob Christensen.” [Docket #7, pg. 37] Bob Christensen is
3 believed to be related to Del Christensen. No payments should be authorized to
4 “Bob Christensen” until his relationship with the Debtors and the basis for the
5 payments are further investigated;
6

7 7. The expenses appear to include \$26,000.00 in payments
8 on or before April 1 to “U12B253, LLC.” [Docket #7, pg. 37] U12B253, LLC is an
9 affiliate of the Debtors, and also a co-obligor on the Debtors’ loans from RAF. No
10 payments should be authorized to U12B253, LLC as part of interim use of cash
11 collateral and, instead, the Court should consider whether payments to this
12 entity are warranted as part of the final hearing;
13

14 8. There are several affiliated companies that are housed in
15 the same facility as the Debtors, including Saddle Mountain Wireless, U12B253,
16 EZ Fixings Foods and EZ Fixings. There is no discussion in the Cash Collateral
17 Motion or in the budgets about whether any of these companies are contributing
18 to the payment of rent or other expenses. That disclosure should be made prior
19 to authorizing the Debtors to pay rent for their facilities; and
20

21 9. The Payment Schedule [Docket #7, pg. 38] indicates that
22 only \$717,760.00 in payments are due by April 1 on Tatoes’ leases (including
23 some of the objectionable payments identified above), and yet the Tatoes’ budget
24 [Docket #7, pg. 34] indicates the amount is \$967,235.00. No explanation is given
25

1 for this discrepancy.

2 iii. Storage Costs and Related Overhead and Transportation-The
3 Christensen Decl states that “the expenses that are required in the very near term
4 are significant and primarily represent costs associated with: (a) preparing the
5 land for planting; (b) making lease payments; (c) acquiring potato and onion seed;
6 (d) planting crops; (e) paying for irrigation water; and (g) labor associated with the
7 foregoing.” [Docket #7, pg. 10, ¶20]. On the Tatoes Emergency Budget (Exhibit
8 2) [Docket #7, pg. 34], however, Tatoes identifies a number of expenses starting
9 with “Storage Costs (est.) 2015 Crop,” and below that a number of overhead
10 charges for wages, taxes, research and maintenance, along with “Corp Cost” and
11 “Transportation 2015 Crop,” and ending with a weekly line item amount of
12 \$48,529.96 for “Overhead (based on %).” There is no explanation or detail for any
13 of these expenses in the pleadings RAF has reviewed, nor does it appear from the
14 Christensen Decl. that these are truly emergency expenses that must be
15 authorized prior to the final hearing on the Cash Collateral Motion since they do
16 not relate to preparing and planting of the 2016 Crops. Further, as noted above,
17 many non-debtor affiliates share facilities with the Debtors, yet there is no
18 discussion about whether these overhead expenses are solely related to Tatoes’
19 operations, or if instead they are for both Tatoes and other affiliates. In short,
20 these proposed expenses deserve further investigation, and payments from any of
21 these line items (starting with “Storage Costs (est.) 2015 Crop” and ending with
22
23
24
25

1 “Overhead (based on %)” should not be authorized pending the final hearing on
2 the Cash Collateral Motion.

3 b. Wahluke Produce Emergency Budget (Exhibit 3).

4 i. Professional Fees-Wahluke Produce has budgeted \$10,000.00
5 per week for the first two weeks and then \$16,250.00 per week thereafter for
6 professional fees. [Docket #7, pg. 40] There is no explanation or detail regarding
7 this expense. There have been no orders entered authorizing the payment of
8 retainers for professionals, no orders entered authorizing the employment of
9 professionals and there have been no professional fees allowed. Payments from
10 this line item should not be authorized pending the final hearing on the Cash
11 Collateral Motion.
12
13

14 c. Columbia Onion Emergency Budget (Exhibit 4).

15 i. Professional Fees-Columbia Onion has budgeted \$2,700.00 on
16 April 1, 2016 and \$5,400.00 on April 29, 2016 for professional fees. [Docket #7,
17 pg. 42] There is no explanation or detail regarding these expenses. There have
18 been no orders entered authorizing the payment of retainers for professionals, no
19 orders entered authorizing the employment of professionals and there have been
20 no professional fees allowed. Payments from this line item should not be
21 authorized pending the final hearing on the Cash Collateral Motion.
22
23

24 ii. Rent—Columbia Onion also has budgeted \$5,000.00 for the
25 payment of rents on April 1, 2016, and another \$52,000.00 for rents on April 29,

1 2016. [Docket #7, pg. 42] Yet the Christensen Decl. states that the “Wahluke
2 and Columbia budgets represent the costs of packing the 2015 crops.” No
3 explanation has been given about why Columbia Onion would be paying rent if its
4 business consists of packing the 2015 crops. Who does it pay rent to? Payment
5 from this line item should not be authorized pending a final hearing on the Cash
6 Collateral Motion.
7

8 6. Third, in addition to reducing the period of interim cash collateral use
9 and not authorizing the particular line item expenses noted above at the interim
10 hearing, the Court also should make some additional rulings at the preliminary
11 hearing and include such rulings in any interim order to protect RAF and provide
12 RAF with the adequate protection it is entitled to under the Bankruptcy Code.
13 *See, e.g., In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa. 1982) (a court’s authority to
14 grant use of cash collateral carries with it concomitant responsibility to insure
15 that value of creditor’s security is not impaired and court may do this by using
16 non-exclusive terms set forth in 11 U.S.C. § 361).
17

18 7. In this regard, RAF agrees with the Debtor that RAF should be
19 granted “first position security interest and lien in the 2016 Crops as partial
20 adequate protection.” The proposed *Emergency Order Approving Use of Cash*
21 *Collateral* (the “Proposed Interim Order”), however, does not provide for that relief.
22 In fact, the Proposed Interim Order does not appear to grant RAF a replacement
23 lien at all. Paragraph 8 of the Proposed Interim Order simply states that “[a]ny
24
25

1 party with a security interest or lien in the pre-petition assets of the Debtors or
2 the Cash Collateral shall retain said security interests or liens in the same
3 priority and to the same extent in said assets and Cash Collateral or in any
4 proceeds of such assets or Cash Collateral subject only to the Debtors' ability to
5 use the Cash Collateral as provided herein." This language does nothing other
6 than say that, if a creditor such as RAF has a lien on pre-petition assets and cash
7 collateral (and the Debtors say that RAF is the only secured creditor who has
8 such an interest), then the creditor shall continue to have its lien in the same
9 property and with the same priority, except that the Debtors get to use cash
10 collateral as authorized by the Court. In short, the Proposed Interim Order does
11 not grant RAF the first priority post-petition replacement lien on the 2016 Crops
12 that the Debtors promised to grant, and the Court should not authorize any use
13 of cash collateral, even on an interim basis, without also giving RAF this
14 protection. Further, the post-petition replacement lien granted to RAF should be
15 deemed continuing and perfected for all purposes by operation of law as of the
16 Petition Date, without further action by RAF or any requirement that RAF file or
17 record any documents to perfect its interest in this property, and should not be
18 subject to the liquidation of all of RAF's other collateral as requested by the
19 United States Trustee in the objections it filed to the Debtors' Cash Collateral
20 Motion.
21
22
23
24

25 8. Further, in addition to the replacement lien which the Debtors say

1 they will grant to RAF but which the Proposed Interim Order does not grant, the
2 Debtors also propose, in paragraph 6 of the Proposed Interim Order, to give RAF
3 and certain other parties in interest certain reports. RAF agrees that these
4 reports should be provided, both during the interim cash collateral period and
5 during any continued period thereafter while the Debtors continue to use RAF's
6 cash collateral. Under the language as drafted, however, the Debtors would not
7 have to provide weekly reporting until the close of business on the Wednesday
8 following the preceding Friday, and the report would be for the week ending on
9 the preceding Friday. The Debtors do not need five days to provide these reports.
10 They should be due at noon Pacific Time on the Tuesday following the preceding
11 Friday ending the cash collateral period. Further, the Proposed Interim Order
12 and any Order authorizing the use of cash collateral on a final basis should make
13 clear that the weekly reports shall be provided by email delivery to both RAF and
14 RAF's counsel at the following email address (or at such other email addresses as
15 RAF may subsequently request): (a) wayne.graffis@raboag.com; (b)
16 justin.linderman@raboago.com; (c) mjohnson@rqn.com; and (d)
17 dmonson@rqn.com. Further, in addition to the reports identified by the Debtors,
18 RAF requests that, during the interim cash collateral period, the Debtors also be
19 ordered to provide RAF with the following additional reports:
20
21
22
23

24 a. A beginning and ending cash balance for each of the Debtors, for
25 each reporting period (i.e., the first cash balance report would report on the cash

1 balance beginning as of the Petition Date and ending on March 25, 2016, the
2 second cash balance report would report on the cash balance beginning as of
3 March 26, 2016 and ending on April 1, 2016, and so forth);

4 b. The weekly accounts receivable reports to be provided should include
5 an aging report (current, 30 days, 60 days, etc.) for each vendor; and
6

7 c. The Debtors also should be required to provide weekly accounts
8 payable reports which also include aging for each of the payables by vendor.

9 9. The Court's Interim Order authorizing the Debtors' use of cash
10 collateral also should require the Debtors to fully cooperate with RAF in an AFCID
11 inspection of RAF's personal property collateral, with RAF to pay its own costs
12 concerning such inspection and with the inspection to be conducted by no later
13 than three (3) business days prior to the final hearing on the Cash Collateral
14 Motion.
15

16 10. Finally, the Court's Interim Order authorizing the Debtors' use of
17 cash collateral should require the Debtors to provide RAF with proof of adequate
18 insurance coverage for RAF's collateral and the Debtor's operations by no later
19 than Monday, March 28, 2016, at 5:00 p.m.²
20
21

22
23 ² The Debtor also proposes to make "quarterly interest only payments on the
24 Cash Collateral portion of RAF's loans at the non-default rate provided for in
25 RAF's loan documents. The first interest payment would be due ninety (90) days
following the entry of the final order authorizing the use of cash collateral." RAF
will address these proposed payments when it files its Final Response and
Objection to the Cash Collateral Motion in advance of the final hearing.

1 WHEREFORE, for the reasons set forth herein, RAF respectfully requests
2 that the Court only grant the Debtors' Cash Collateral Motion on an interim basis
3 pending a final hearing, and only to the extent requested herein. RAF also
4 respectfully requests that any Interim Order authorizing the use of cash collateral
5 contain the protections and limitations set forth above. RAF also respectfully
6 requests that the Court schedule a final hearing on the Cash Collateral Motion for
7 a date and time to be determined by the Court on or before April 22, 2016. RAF
8 also respectfully requests that the Court's Order expressly provide as follows:
9 "Nothing in this Order shall prevent or prejudice RAF or any other party in
10 interest from requesting the Court, on an emergency basis, to terminate the use
11 of Cash Collateral prior to the final hearing on the Cash Collateral Motion, or
12 from seeking any other relief including, without limitation, stay relief or dismissal
13 or conversion of this case or appointment of an Examiner or Chapter 11 Trustee."
14

15
16
17 Finally, RAF reserves all of its rights with respect to the Debtors' request for
18 use of cash collateral and any final hearing on the Cash Collateral Motion, and it
19 further reserves its right under Section 507(b) of the Bankruptcy Code to seek a
20 super-priority administrative expense claim in these cases in the event that any
21 adequate protection ordered by the Court turns out to be insufficient to protect
22 RAF's interests.
23

24 / / /

25 / / /

1 DATED this 24th day of March 2016.

2 DAVIDSON BACKMAN MEDEIROS PLLC

3
4 /s/ Bruce K. Medeiros
5 Bruce K. Medeiros, WSBA No. 16380

6 - and -

7 RAY QUINNEY & NEBEKER, P.C.

8 Michael R. Johnson, Utah Bar No. 7070
9 Douglas M. Monson, Utah Bar No. 2293
10 (*Pro Hac Vice Pending*)

11 *Attorneys for Rabo AgriFinance, Inc.*